 11cv639 RHK/JJG

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Tom Brady, Drew Brees, Vincent Jackson, Ben Leber, Logan Mankins, Peyton Manning, Von Miller, Brian Robison, Osi Umenyiora, and Mike Vrabel, individually, and on behalf of all others similarly situated Plaintiffs, vs. NATIONAL FOOTBALL LEAGUE, et al., Defendants.	Civil Action No. _____ Declaration of Richard A. Berthelsen

Richard A. Berthelsen, being duly sworn, deposes and states as follows:

1. I am General Counsel of the National Football League Players Association ("NFLPA"), and have served in that capacity since 1983. In addition, from August 21, 2008 to March 15, 2009, I served as Interim Executive Director after the death of Executive Director Gene Upshaw. I have been an attorney for the NFLPA since 1972. I make this Affidavit in support of the request of the class for a preliminary injunction enjoining the NFL Defendants' purported "lockout."

2. Beginning nearly 40 years ago, professional football players have been fighting for certain basic freedoms available to all other American

workers: the right to determine where they work and who they work for. Beginning with the Mackey case, the NFLPA and professional football players have battled the NFL and its clubs over a wide variety of restraints on the free movement of players, including the Rozelle Rule, the NFL college draft and, in the early 1990's, the First Refusal/Compensation rules in Plan B. This fight has continued through countless lawsuits, two player strikes and the termination of the NFLPA as the collective bargaining representative of NFL players.

The White Settlement and The NFL's Waiver Of Any Sham Renunciation Defense

3. In 1990, after the NFL players renounced the NFLPA as a labor union and thereby ended their collective bargaining relationship with the NFL Defendants, eight individual football players filed a lawsuit against the NFL and all of its member teams, alleging, inter alia, that the imposition of certain player restraints constituted a violation of Section 1 of the Sherman Act. McNeil v. National Football League, No. 4-90-476 (D. Minn.).

4. The McNeil plaintiffs moved for partial summary judgment against the NFL Defendants' assertion of a labor exemption defense on the ground that, because the NFLPA had ended its role as a collective bargaining representative, the non-statutory labor exemption could not apply. The McNeil Court granted the plaintiffs' motion, finding that the non-statutory labor exemption ended no later than December 5, 1989, since the players were "no longer part of an 'ongoing collective bargaining relationship' with the [NFL]

defendants." Powell v. NFL & McNeil v. NFL, 764 F. Supp. 1351, 1358 (D. Minn. 1991). On September 10, 1992, the McNeil jury found that certain restraints implemented by the NFL violated Section 1 of the Sherman Act and that the plaintiffs in McNeil suffered economic injury as a result.

5. Shortly after the McNeil verdict, and at about the same time that the Court entered a preliminary injunction against the NFL's continued imposition of unlawful restraints in Jackson, five NFL players, in White v. National Football League, No. 4-92-906 (D. Minn.), filed a case on behalf of an injunctive relief class challenging various NFL restraints on the market for player services, including Plan B, under the antitrust laws. The White case ultimately settled, resulting in the White parties originally entering into a Stipulation and Settlement Agreement ("SSA") on February 26, 1993.

6. I was personally involved with the negotiations that lead to the settlement in White.

7. The NFL Defendants in White insisted on the right to terminate the SSA unless the players re-formed a union and entered into a new CBA embodying the terms of the SSA within 30 days. The NFL Defendants demanded this as a condition of settlement.

8. The White class agreed to the NFL Defendants' demand that they reform a union, but required protection from the NFL Defendants later using the reformation as a basis to once again violate NFL players' rights under the

antitrust laws. Thus, both Article XVIII, Section 5(b) of the SSA and Article LVII, Section 3(b) of the CBA contain an express waiver by the NFL Defendants of any right to challenge a decision by the majority of NFL players to give up their union status once the SSA expires:

> [T]he parties agree that, after the expiration of the express term of any CBA, in the event that at that time or any time thereafter a majority of players indicate that they wish to end the collective bargaining status of any Players Union on or after expiration of any such CBA, the Defendants and their respective heirs, executors, administrators, representatives, agents, successors and assigns waive any rights they may have to assert any antitrust labor exemption defense based upon any claim that the termination by the players or any Players Union of its status as a collective bargaining representative is or would be a sham, pretext, ineffective, requires additional steps, or has not in fact occurred.

Article XVIII, Section 5(b) of the SSA. Virtually identical language appears in Article LVII, Section 3(b) of the CBA.

9. If the NFL Defendants had not agreed to this waiver of rights provision, the players would not have acceded to the NFL's demand that they form a union once the SSA was executed.

10. Indeed, the now-deceased former Executive Director of the NFLPA, Eugene Upshaw, submitted a sworn declaration under oath attesting to this very fact in connection with the NFL's 1997 attempt to terminate this Court's jurisdiction to enforce the SSA:

> The only reason I agreed to recommend that the NFLPA be converted from a trade association back into a union, however, is because the owners demanded that as a condition for the Settlement

> Agreement, but also agreed to a provision that, at the end of the settlement, a majority of players could indicate their desire to terminate the union and the owners couldn't then use against the players the existence of the union during the term of the Settlement Agreement. I would never have recommended that the players reform the NFLPA as a union in 1993, shortly after the White Settlement Agreement had been agreed to, and agreed to a Collective Bargaining Agreement with the NFL owners, if the union could be used to hurt the players. Indeed, if that were the result, I would not hesitate to recommend that the players immediately decertify the NFLPA as their collective bargaining representative.

Declaration of Eugene Upshaw, dated August 25, 1997, at ¶ 8. A true and correct copy of this declaration is attached hereto as Exhibit A.

11. It was only after this protection was in place in the SSA that the NFL players reconstituted the NFLPA as a union and proceeded to collectively bargain and enter into a CBA with the NFL that incorporated the terms of the SSA with various amendments, which were approved by the Court.

The NFL Defendants Terminate the SSA and CBA To Demand Massive Givebacks

12. The parties subsequently amended and extended the SSA and CBA in 1996, 1999, 2002, and 2006. The 2006 amendments extended the SSA and CBA through and including the 2012 NFL season, but also provided the NFL with the right to "opt-out" of the SSA and CBA after the 2010 NFL season.

13. On May 20, 2008, the NFL exercised its unilateral option to terminate the most recent SSA and CBA, effective after the 2010 NFL season ended at midnight on March 3, 2011. On March 3, 2011, however, the parties agreed to extend the SSA and CBA by twenty-four hours. On March 4, 2011, the

parties agreed to further extend the SSA and CBA by one week. Thus, the most recent SSA and CBA will expire by their terms at midnight on March 11, 2011.

14. The NFL stated that it was terminating these agreements because it felt that the players were receiving an excessively high percentage of revenue, and that it was going to seek a substantial re-distribution of revenues from the NFL players to the NFL Defendants by imposing a new more restrictive system of player restraints.

15. For over two and half years since May 2008, the parties negotiated in an attempt to reach agreement on an extension of the SSA and CBA. During those negotiations, the NFL made it clear that they would let the SSA and CBA expire if the players did not agree to massive give-backs. Indeed, the two main proposals made by the NFL were an 18% roll back on the share of revenue to which the players were entitled and a restrictive rookie wage scale.

16. It was my belief, all along, that if the players did not agree to these excessive give-backs being demanded by the NFL Defendants, the NFL Defendants would "lockout" the players in an attempt to coerce the players into acceding to these demands. Indeed, this Court has already recognized that the NFL Defendants have been planning, at least since May 2008, to let the CBA and SSA expire at the end of the 2010 league year and to lockout the players in 2011 with the aim of forcing a CBA more favorable to Defendants: "In May 2008, the NFL opted out of the final two years of the CBA, and recognized that a lockout in

2011 would help achieve a more favorable CBA." White v. NFL, No. 4-92-906, at 19 (D. Minn. March 1, 2011). Also, the NFL has stated that the players would have to agree to a new set of rules, including player restraints. These rules, if agreed to by the players, would have the effect of transferring billions of dollars of revenue from the players to the owners in the form of reduced salaries and economic constraints. The NFL owners have made these demands at the same time as they have conceded that all of the teams are profitable.

The Players Terminate the NFLPA's Status as Their Collective Bargaining Representative

17. As a result of the NFL Defendants' continued insistence on these massive givebacks, to be sought through a lockout, the NFL players, as they did in 1989, determined that it is not in their interest to remain unionized if the existence of such a union would serve to allow the NFL to impose anticompetitive restrictions with impunity. Accordingly, the players took steps to terminate the NFLPA's status as a collective bargaining representative.

18. By March 11, 2011, a substantial majority of NFL players had voted to end the collective bargaining status of the NFLPA, effective as of 4:00 p.m. Eastern time on March 11, 2011.

19. Further, the player representatives of the NFLPA, which serves as its governing body, have met and voted to restructure the organization as a professional association instead of a union.

20. On March 11, 2011, the NFLPA notified the NFL that it was disclaiming interest in acting as the collective bargaining representative of NFL players, effective as of 4:00 p.m. Eastern time on March 11, 2011.

21. By March 11, 2011, the NFLPA had amended its bylaws to prohibit it or its members from engaging in collective bargaining with the NFL, the NFL's member clubs or their agents.

22. The NFLPA is in the process of filing a labor organization termination notice with the Department of Labor.

23. An application is being filed with the IRS to reclassify the NFLPA for tax purposes as a professional association rather than a labor organization.

24. On March 11, 2011, the NFLPA informed the NFL that, effective as of 4:00 p.m. Eastern time on March 11, 2011, the NFLPA no longer represented players in grievances under the expired CBA, and that players must pursue or defend any grievance with the NFL or its members on an individual basis. All affected players were also notified of this change.

25. By March 12, 2011, the NFLPA will have ceased the regulation of player agents and other activities associated with being the collective bargaining representative of NFL players. The NFLPA notified both previously certified player agents and the NFL of this change.

26. The NFLPA has also ended its participation in the benefit application process or other business being conducted by the Bert Bell Plan or any other benefit plans provided for the by the expiring CBA, and notified the NFL of the same.

27. These steps meant that the players gave up all their rights to collectively bargain, the right to strike, and all other labor law rights that are only available to unionized employees.

The "Lockout" and the Irreparable Injury to NFL Players

28. The NFL Defendants have made it clear to the NFLPA that they intend to implement a "lockout" of the NFL players commencing immediately after expiration of the SSA and CBA at midnight on March 11, 2011. It is my understanding that under a "lockout," no players will be paid, no competition for player services or player contract negotiations will be permitted, all team training facilities will be shut down along with all other football activities, and 2011 NFL pre-season and regular season games will not commence.

29. The ongoing injury that will be suffered by class members from a "lockout" and the NFL's unilateral imposition of other player restraints may never be compensable in monetary damages. This is due -- as this Court recognized in its opinion in support of the temporary restraining order in Jackson v. NFL, 802 F. Supp. 226, 230-31 (D. Minn. 1992) -- to the short careers of most NFL players, many of whom would not be playing at the conclusion of this class

action and other related cases, and the difficulty in determining the salary and benefits that each particular player, with a unique set of abilities and circumstances, could have earned in a competitive market. This difficulty is underscored by the jury's verdict in the McNeil case, pursuant to which four of the eight plaintiffs received no damages for the injuries they suffered as a result of the NFL's unlawful player restrictions. In addition, the non-monetary injuries suffered by players who are being denied freedom of movement will never be adequately redressed.

30. Indeed, I know from my many years of experience working for the NFLPA that NFL player's careers, in general, are exceedingly short compared to other professions. Many NFL players have left the NFL after only a short time, and, from my experience, I believe that the average career of an NFL player is less than 4 years. The constant risk of career-ending injury is one important factor contributing to the extremely abbreviated career length for NFL players. Numerous players have seen their NFL careers cut short or ended by severe playing injuries, suffered both in games and practice. In addition, the wear and tear of just playing in the NFL is severe, and diminishes the physical capability of players over time. I believe these risks are typical for every NFL player.

31. A "lockout" imposed by the NFL Defendants will threaten to rob NFL players of an entire year, or more, of their brief playing careers, which

can not be recaptured. This is especially problematic because of the virtually constant need for NFL players to prove their skill and value on the playing field. Missing a year or more of playing in the NFL can cause the skills of NFL players to become diminished from the lack of competition, making it difficult for them to regain the full talents they exhibited prior to the absence from play. This could shorten or even end the careers of NFL players, including veteran players.

32. Also, if young players are forced to forego an entire season, they will miss out on a year of the experience and exposure that comes from playing against NFL-level competition and receiving NFL-level coaching, both of which are a must for young players. If the entire 2011 season is cancelled, these players will be competing for roster spots again next year with a new group of incoming players who would not have gone an entire year without competing on the football field. Young players also often maximize their value by negotiating extensions of their current contracts before they reach free agency.

33. In addition, for NFL players not currently under contract, a "lockout" will also deprive them of new contracts that would be negotiated in a free market, the precise terms of which may be impossible to recreate.

34. For NFL players with contracts, their injuries will also include NFL teams' refusal to pay contractually owed amounts under their contracts and refusal to allow players to report for work at the appointed time.

35. It is my belief that NFL players will not be able to fully recover from the harm they will suffer if they lose even part of an NFL season and/or off-season as a result of a "lockout."

Dated: March 11, 2011

s/Richard A. Berthelsen

Richard A. Berthelsen

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

REGGIE WHITE, et al.,	:	
Plaintiffs,	:	
v.	:	DECLARATION OF EUGENE UPSHAW
NATIONAL FOOTBALL LEAGUE, et al.,	:	Civil Action No. 4-92-906
Defendants.	:	

Eugene Upshaw hereby declares under penalty of perjury, as follows:

1. I am Executive Director of the National Football League Players Association (the "NFLPA"), and have served in that capacity since 1983. I am personally familiar with the details of the Settlement Agreement in the White class action and the negotiations leading to that settlement, and to the extension of the settlement that was made last year. I submit this declaration in opposition to the motion of the defendants in this class action -- the National Football League ("NFL") and its member clubs -- to terminate this Court's jurisdiction to enforce the Settlement Agreement.

2. In 1993, after the White Settlement Agreement was negotiated but before this Court approved it, I had the opportunity to speak with literally

hundreds of NFL players, who are members of the class, about the proposed settlement. Under my direction, NFLPA staff members had meetings with most of the players in the NFL where they explained the details of, and answered players' questions concerning, the proposed settlement. I also personally had dozens of phone calls with additional players, who are members of the class in this action, about the proposed settlement.

3. After talking with and relaying reports on the views of the players, I urged this Court to approve the Settlement Agreement. I submitted affidavits urging that the settlement be approved, and testified in support of the settlement at the fairness hearing conducted by this Court.

4. Continuing court supervision over the terms of the Settlement Agreement was critical to the players' support of the proposed settlement. In my conversations with players, it was always crucial to me -- and it was often a subject raised by the players -- that this Court would be available to enforce the settlement against the owners. Otherwise, I would never have recommended the settlement to the players or this Court.

5. I understand that the NFL owners are now contending that this Court is no longer needed to ensure that the Settlement Agreement is enforced, because the players and the owners have a better relationship than they did in 1993. My experience with the relationship over the past four years tells me that the exact

opposite is true. The parties have brought only a few disputes to the Court since the Settlement Agreement went into force. However, there have been many, many more disputes between the players and the owners that the parties were able to work out, only because both sides knew that the Court would always be there to enforce the terms of the Settlement Agreement.

6. The necessity of court review to protect the interests of the players who make up the White class is evident from the NFLPA's hard experience with the NFL owners. After the Mackey case in the 1970's, the NFLPA tried, but failed, to get court supervision over the new player movement system, because the Court indicated that the parties did not need it and the agreement had been entered into in good faith. As a result, in the years that followed, leading up to the 1987 strike, the NFLPA hardly ever reached peaceful agreements with the NFL because the owners knew that the players had no recourse before someone who was truly independent. The owners knew that CBA arbitrators don't have the same independence as a court because they are hired by the parties and can lose their job if one or both of the parties get upset with their decisions. Without someone truly independent to enforce the terms of the deal, the owners were rarely willing to compromise whenever a dispute arose, and they didn't hesitate to violate the CBA when they thought they could get away with it.

7. I had the above experience clearly in mind when I was reviewing the White settlement to determine if I could support it. With NFL players obtaining significant free agency for the first time in our lives, my concern was very much that there be ongoing court supervision to enforce the agreement and prevent collusion by the owners. I would never have recommended the settlement if enforcement of the agreement was going to be left in the hands of a labor arbitrator hired, in part, by the owners.

8. I understand that one of the reasons the NFL owners give for arguing that this Court is no longer needed is the post-settlement vote of the players to convert the NFLPA back into a labor union. The only reason I agreed to recommend that the NFLPA be converted from a trade association back into a union, however, is because the owners demanded that as a condition for the Settlement Agreement, but also agreed to a provision that, at the end of the settlement, a majority of players could indicate their desire to terminate the union and the owners couldn't then use against the players the existence of the union during the term of the Settlement Agreement. Settlement Agreement, Article XVIII, Paragraph 5(b). I would never have recommended that the players reform the NFLPA as a union in 1993, shortly after the White Settlement Agreement had been agreed to, and agreed to a Collective Bargaining Agreement with the NFL owners, if the union could be used to hurt the players. Indeed, if that were the result, I would not hesitate to recommend

that the players immediately decertify the NFLPA as their collective bargaining representative.

9. The timing of this motion by the owners is also very troubling. It was only last year -- after the Supreme Court's decision in Brown -- that the owners and the players agreed to extend the terms of the Settlement Agreement and the CBA into the next century. At no time in those extensive negotiations did I ever hear any suggestion from the owners that the jurisdiction of this Court to enforce the settlement be terminated. I would never have agreed to an extension of the CBA -- and would never have agreed to recommend a corresponding extension of the White Settlement Agreement -- if the extension had been proposed without the continued availability of this Court to ensure that the owners live up to their part of the deal.

10. Finally, it is very important that the players know the outcome of this motion no later than December 1, 1997. Under the terms of the Settlement Agreement extension, the NFLPA and Class Counsel must give notice to the owners by that date if they wish to cancel the second year's extension of the Settlement Agreement and CBA, into the 2001 League Year. The availability of this Court to ensure that the terms of the Settlement Agreement are followed is so important that

the NFLPA will not likely agree to the extension if there is no continued court supervision over the terms of the Settlement Agreement.

Dated: August 25, 1997

EUGENE UPSHAW